INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	12
Appendix A	13
Appendix B	15

CITATIONS

Cases:

Alexander Film Co. v. *Industrial Comm'n*, 136 Colo. 486, 319 P.2d 1074	10
Bower v. *Industrial Comm'n*, 61 Ohio App. 469, 22 N.E. 2d 840	10
Boynton v. *McKales*, 139 Cal. App. 2d 777, 294 P. 2d 733	10
Bowen v. *Keen*, 154 Fla. 161, 17 So. 2d 706	10
Cardillo v. *Liberty Mutual Ins. Co.*, 330 U.S. 469	6
Central Copper Co. v. *Klefisch*, 34 Ariz. 230, 270 Pac. 629	10
Clapham v. *David*, 232 App. Div. 458, 251 N. Y. Supp. 245	10
Fidelity & Casualty Co. of New York v. *Industrial Accident Comm'n*, 176 Cal. App. 2d 541, 1 Cal. Reptr. 567	10
Fleer v. *Glens Falls Insur. Co.*, 16 A.D. 2d 186, 226 N.Y.S. 2d 918	10
Gardner v. *Industrial Comm'n*, 72 Ariz. 274, 233 P. 2d 833	9
Hastorf-Nettles, Inc. v. *Pillsbury*, 203 F. 2d 641	6, 8
Jefferson County Stone Co. v. *Bettler*, 304 Ky. 87, 199 S.W. 2d 986	10
Lamm v. *Silver Falls Timber Co.*, 133 Ore. 468 286 Pac. 527	10

Cases—Continued Page

Miller v. *Bartlett Tree Expert Co.*, 3 N.Y. 2d 654 148 N.E. 2d 296 10
O'Leary v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 ..... 6, 9
Reinert v. *Industrial Accident Comm'n*, 46 Cal. 2d 349, 294 P. 2d 713 10
Schneider v. *United Whelan Drug Stores*, 284 App. Div. 1072, 135 N.Y.S. 2d 875 9
Schreiber v. *Revlon Products Corp.*, 5 A.D. 2d 207, 171 N.Y.S. 2d 122 10
Self v. *Hanson*, 305 F. 2d 699 ..... 6, 8
Shell Oil Co. v. *Industrial Accident Comm'n*, 18 Cal. Rept. 540 10
Southern Motor Lines Co. v. *Alvis*, 200 Va. 168, 104 S.E. 2d 735 10
Southern Surety Co. v. *Shook*, 44 S.W. 2d 425 (Tex. 1931) 10
Souza's Case, 316 Mass. 332, 55 N.E. 2d 611 10
Standard Oil Co. v. *Witt*, 283 Ky. 327, 141 S.W. 2d 271 10
Thornton v. *Hartford Accident & Indemnity Co.*, 198 Ga. 786, 32 S.E. 2d 816 10
United States v. *Pan American World Airways*, 295 F. 2d 74, certiorari denied, 368 U.S. 980 7
Williams v. *School City of Winchester*, 104 Ind. App. 88, 10 N.E. 2d 314 10

Statutes:

Defense Bases Act (Act of August 16, 1941), as amended, 56 Stat. 1035, 42 U.S.C. 1651, *et seq.* 16, 17
Longshoremen's and Harbor Workers' Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*:
Section 2(2), 33 U.S.C. 902(2) 6, 15
Section 3, 33 U.S.C. 903 15
Section 19, 33 U.S.C. 919 ..... 6, 15
Section 20, 33 U.S.C. 920 16
Section 21, 33 U.S.C. 921 16

Miscellaneous: Page

Annual Report, U. S. Dept. of Labor (1961) 11
Annual Report of the United States Department of Labor (1961), pp. 56-57 11
1 Larson, *Workmen's Compensation Law*, 328-329 .. 7

In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

WILLIAM M. O'KEEFFE, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, PETITIONER

v.

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INC., and ROYAL INDEMNITY CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of William M. O'Keeffe, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 27, 1964.

OPINIONS BELOW

The opinion of the court of appeals is reported at 327 F. 2d 1003 (App. A, *infra*, pp. 13-14). The opinion of the district court is reported at 222 F. Supp. 4.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 14) was entered on February 27, 1964. By an order dated May 27, 1964, Mr. Justice Black extended the time for filing this petition to and including July 24, 1964. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Deputy Commissioner found that the death by drowning of an employee, who was stationed at a defense base in South Korea, arose out of and in the course of his employment, and awarded the employee's widow and child monthly death benefits under the Longshoremen's and Harbor Workers' Act, as extended by the Defense Bases Act. The district court affirmed the finding and sustained the compensation award.

The question presented is whether the court of appeals, in re-examining the Deputy Commissioner's finding, invoked the more exacting standards generally applicable to employment at a home base rather than the more liberal standards properly applicable in the case of defense-based employment.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*) and the Defense Bases Act (Act of August 16, 1941, as amend-

ed, 56 Stat. 1035, 42 U.S.C. 1651, *et seq.*) are set forth in Appendix B.

STATEMENT

This action was brought in the United States District Court for the Middle District of Florida by the employer (respondent Smith, Hinchman & Grylls Associates, Inc.) and its insurance carrier (respondent Royal Indemnity Company) to set aside and enjoin enforcement of a compensation order awarding death benefits under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Bases Act, to the widow and minor child of Robert C. Ecker, a deceased employee (R. 2-24). Ecker, at the time of his death, was employed at a defense base in South Korea by Smith, Hinchman & Grylls Associates, a government contractor subject to the provisions of the Longshoremen's Act (R. 3). The employee drowned while boating on a lake located 30 miles east of Seoul, South Korea. The Deputy Commissioner found that the accident and subsequent death arose out of and in the course of Ecker's employment (R. 7). The undisputed facts underlying the finding were stipulated before the Deputy Commissioner and may be summarized as follows.

Ecker was hired in the United States under an oral employment contract by the terms of which he was to be transported to South Korea, remain there for two years, and then be transported back to the United States (R. 14, 21, 23). He worked in Korea as assistant to the employer's administrative officer and

was responsible for stenographic and clerical department personnel (R. 13). He lived in the city of Seoul and was paid by the employer for the cost of his housing and utilities (R. 14). In addition, Ecker received a payment of 3,000 hwan ($6.00) per day from the employer "as a per diem expense to cover the necessary living expenditures in the Korean economy" (R. 22). He worked on a "365 day per year basis * * * subject to call to the job site at any time, but usually spent only eight hours a day at the job site;" however, he "quite often worked Saturdays and Sundays," and frequently was called upon to work at times other than the usual working hours (R. 14, 21). In fact, it was quite possible that Ecker had worked the Saturday morning of his accident (R. 24). In addition, as the employer emphasized, all its employees "are considered in the course of regular occupation from the time they leave the United States until their return" (R. 23).

The employer furnished no recreational facilities for its employees, but invited them to participate in recreational activities furnished by the United States Government for personnel working on government contracts (R. 22). The employer, however, "knew and expected Mr. Ecker and other employees" to seek recreational activity away from the job site on weekends and holidays (R. 23, 14).

The Deputy Commissioner found that although Ecker was not performing direct service for the employer on the day of his death, he was on call and paid full wages for that day (R. 7). He further

found that the conditions of Ecker's employment "created a zone where he had to seek recreation under exacting and unconventional conditions" (R. 7). He concluded that Ecker's death arose out of and in the course of his employment and awarded benefits to the employee's widow and child (R. 6-9).

After considering the evidence stipulated before the Deputy Commissioner, the district court ruled that "the Deputy Commissioner was correct in his finding that the conditions of the deceased's employment created a zone where the deceased Ecker had to seek recreation under exacting and unconventional conditions and that therefore the accident and death of the decedent arose out of and in the course of employment" (R. 37), affirmed the compensation award and granted the Deputy Commissioner's motion for summary judgment (R. 38).

The Court of Appeals for the Fifth Circuit, in reversing the district court and setting aside the award, held that (App. A, p. 13):

> Unless the facts of *United States and Gondeck v. Pan American World Airways*, 5th Cir. 1962, 299 F. 2d 74, are to be distinguished or the principles there set forth are to be rejected, we must reverse the judgment of the district court. The facts are not to be distinguished. Indeed, the facts here make a stronger case for the employer than in *Gondeck*. We adhere to the doctrine of the *Gondeck* case and reverse the district court.

REASONS FOR GRANTING THE WRIT

The failure of the court below to uphold the Deputy Commissioner's finding that the employee's death arose out of and in the course of his employment is in direct conflict with decisions of the Court of Appeals for the Ninth Circuit in *Self* v. *Hanson*, 305 F. 2d 699, and *Hastorf-Nettles, Inc.* v. *Pillsbury*, 203 F. 2d 641. If permitted to stand, the decision below will mean that in the Fifth Circuit there is a much more exacting standard of what constitutes an injury or death arising out of and in the course of employment at an overseas defense base than applies in the Ninth Circuit.

1. The Longshoremen's Act, as extended by the Defense Bases Act, provides workmen's compensation coverage for an "accidental injury or death arising out of and in the course of employment" at a defense base. 33 U.S.C. 902(2), 42 U.S.C. 1651-1654, *infra*, pp. 15-17. The initial determination of whether an injury or death is covered by the Act must be made by a Deputy Commissioner. 33 U.S.C. 919. His determination is, of course, subject to judicial review, but may be set aside only if unsupported by substantial evidence in the record considered as a whole, or if inconsistent with the law. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469.

The Deputy Commissioner here found "that the conditions of the employment created a zone where the employee had to seek recreation under exacting and

unconventional conditions; [and] that the accident and the subsequent death of the decedent arose out of and in the course of employment" (R. 7). The district court affirmed this finding, but the court below reversed, stating that the doctrine enunciated by it in *United States* v. *Pan American World Airways*, 299 F. 2d 74 (D. N.Y.), certiorari denied, 368 U.S. 980, was controlling. In *Pan American*, the court below had reversed the Deputy Commissioner's award of compensation to the widow of an employee who had been stationed at a defense base on the island of San Salvador. The employee had died as the result of injuries sustained in a "jeep" accident which occurred after he had completed his work for the day and while he was returning from a recreational trip. The court, quoting "black-letter law" from 1 Larson, *Workmen's Compensation Law*, 328-329 (299 F. 2d at 77), stated that:

> Recreational or social activities are within the course of employment when
>
> (a) They occur on the premises during lunch or recreation period as a regular incident of the employment; or
>
> (b) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (c) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee

> health and morale that is common to all kinds of recreation and social life.

These standards, it appears, were also applied by the court below in the instant case. We would have no quarrel with these precepts had this been the usual case of home-based employment. However, as the Ninth Circuit recognized in *Self* v. *Hanson*, *supra*, cases involving employment at overseas defense bases present discrete problems. In affirming the Deputy Commissioner's award of compensation to a Guam defense-base employee who was injured after her work-day had terminated when a truck collided with the parked automobile in which she was sitting, the Ninth Circuit stated "we do not think the case is to be tested by the conventional mainland case * * *." 305 F. 2d at 703. Similarly, in *Hastorf-Nettles, Inc.* v. *Pillsbury*, *supra*, an Alaska defense-base employee was injured in a truck accident while returning from Labor Day recreation some forty miles from his job site. The Ninth Circuit held that factors such as the unique character and isolated place of employment, its remoteness from available recreation, its narrowed limits of normal pastime, and the benefit to both employer and employee of recreation as an economic factor in industrial relations "adequately in law justified the Deputy Commissioner in finding as he did on the whole record before him that Vogel's injuries arose out of and in the course of his employment." 203 F. 2d at 643.

We submit that the Ninth Circuit has properly recognized that the "course of employment" concept must be interpreted more liberally with respect to

injuries occurring at a remote defense base than it is in the "conventional mainland" situation. Its view, we note, is consistent with the decision of this Court in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, which upheld the Deputy Commissioner's "course of employment" finding where an employee stationed at a remote defense base on the island of Guam died by drowning.

The Ninth Circuit's approach is also supported by numerous State court decisions in workmen's compensation cases, which have held that the "course of employment" concept covers a far greater area where an employee has been sent from his home to a distant place on the business of his employer. These cases have developed the "special mission" rule:

> [W]hen an employee is required to travel to a distant place on the business of his employer and is directed to remain at that place for a specified length of time, his status as an employee continues during the entire trip, and any injury occurring during such period is compensable, so long as the employee at the time of injury was engaged in a reasonable activity.

Schneider v. *United Whelan Drug Stores*, 284 App. Div. 1072, 1072-1073, 135 N.Y.S. 2d 875, 876 (1954).[1] See also *Gardner* v. *Industrial Comm'n*, 72 Ariz. 274, 233 P. 2d 833 (1951); *Fidelity & Casualty*

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[1] In that case, an employee was sent on business from his regular employment in New York to Miami, Florida. After completing a day's work in Miami, he was injured when the boat in which he was riding as a guest of a local employee capsized. The court held the injury to be compensable.

Co. of New York v. *Industrial Accident Comm'n*, 176 Cal. App. 2d 541, 1 Cal. Reptr. 567 (1959); *Alexander Film Co.* v. *Industrial Comm'n*, 136 Colo. 486, 319 P. 2d 1074 (1957); *Thornton* v. *Hartford Accident & Indemnity Co.*, 198 Ga. 786, 32 S.E. 2d 816 (1945); *Williams* v. *School City of Winchester*, 104 Ind. App. 83, 10 N.E. 2d 314 (1937); *Souza's Case*, 316 Mass. 332, 55 N.E. 2d 611 (1944); *Miller* v. *Bartlett Tree Expert Co.*, 3 N.Y. 2d 654, 148 N.E. 2d 296 (1958); *Fleer* v. *Glens Falls Insur. Co.*, 16 A.D. 2d 186, 226 N.Y.S. 2d 918 (1962); *Schreiber* v. *Revlon Products Corp.*, 5 A.D. 2d 207, 171 N.Y.S. 2d 122 (1958); *Bower* v. *Industrial Comm'n*, 61 Ohio. App. 469, 22 N.E. 2d 840 (1939); Cf. *Central Copper Co.* v. *Klefisch*, 34 Ariz. 230, 270 Pac. 629 (1928); *Reinert* v. *Industrial Accident Comm'n*, 46 Cal. 2d 349, 294 P. 2d 713 (1956); *Boynton* v. *McKales*, 139 Cal. App. 2d 777, 294 P. 2d 733 (1956); *Shell Oil Co.* v. *Industrial Accident Comm'n*, 18 Cal. Reptr. 540 (1962); *Bowen* v. *Keen*, 154 Fla. 161, 17 So. 2d 706 (1944); *Jefferson County Stone Co.* v. *Bettler*, 304 Ky. 87, 199 S.W. 2d 986 (1947); *Standard Oil Co.* v. *Witt*, 283 Ky. 327, 141 S.W. 2d 271 (1940); *Clapham* v. *David*, 232 App. Div. 458, 251 N.Y. Supp. 245 (1931); *Lamm* v. *Silver Falls Timber Co.*, 133 Ore. 468, 286 Pac. 527 (1930); *Southern Surety Co.* v. *Shook*, 44 S.W. 2d 425 (Tex. 1931); *Southern Motor Lines Co.* v. *Alvis*, 200 Va. 168, 104 S.E. 2d 735 (1958).

2. Under the more liberal approach reflected in the above cases, it seems clear that the Deputy Commissioner's conclusion rested upon adequate findings.

Ecker was hired in the United States and transported by the employer to South Korea to work there, away from his wife and child, for at least a two-year period, at the end of which he was to be transported back to the United States. He was paid on a 365-day-per-year work schedule basis, subject to call at any time of the day or night, frequently worked on Saturdays and Sundays, and was in fact considered by his employer as in the "course of regular occupation" from the moment he left the United States until his return home. The employer furnished no recreational facilities, but, in recognition of the fact that its employees did need recreation, knew and approved of their practice of seeking recreation of the type in which Ecker was engaged at the time of his death.

3. It is important that the existing conflict of decisions be resolved. The significance of the issue is underscored by the far-flung nature of our defense base activities throughout the world and by the further fact that there are several thousands of injury cases reported annually under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Bases Act.[2]

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[2] Annual Report of the United States Department of Labor (1961), pp. 56-57.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
MARTIN JACOBS,
Attorneys.

JULY 1964.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20605

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INCORPORATED, and ROYAL INDEMNITY COMPANY, APPELLANTS

versus

WILLIAM M. O'KEEFFE, Deputy Commissioner, U.S. Bureau of Employees' Compensation for the Sixth Compensation District, APPELLEE

Appeal from the United States District Court for the Middle District of Florida.

(February 27, 1964.)

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

PER CURIAM: The facts which are present in this case are set forth in the findings of fact and conclusions of law of the district court. *Smith, Hinchman & Grylls Associates, Inc. v. O'Keeffe*, D.C.M.D.Fla. 1963, 222 F. Supp. 4. Unless the facts of *United States and Gondeck v. Pan American World Airways*, 5th Cir. 1962, 299 F. 2d 74, are to be distinguished or the principles there set forth are to be rejected, we must reverse the judgment of the district court. The facts are not to be distinguished. Indeed, the facts

here make a stronger case for the employer than in *Gondeck*. We adhere to the doctrine of the *Gondeck* case and reverse the district court. The cause is remanded for the entry of a judgment for the appellants.

REVERSED AND REMANDED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for the entry of a judgment for the appellants.

February 27, 1964

Issued as Mandate: March 24, 1964

APPENDIX B

1. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*) provides in part:

SEC. 2. DEFINITIONS.—When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

SEC. 3. COVERAGE.—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * *

SEC. 19. PROCEDURE IN RESPECT OF CLAIMS.—(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the

deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). * * *

2. The Defense Bases Act (Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U.S.C. 1651 *et seq.*) provides in part:

* * * * *

That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

(3) upon any public work in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone), if such employee is engaged in employment at such place under the contract of a contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) with the United States; but nothing in this paragraph shall be construed to apply to any employee of such a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

* * * * *

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

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